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No. - .

In the Supreme Court of the United States.

OCTOBER TERM, 1982.

LUIGI MANOCCHIO,
PETITIONER,

v.

STATE OF RHODE ISLAND,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF RHODE ISLAND.

Brief in Opposition to Petition for a Writ of Certiorari.

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Questions Presented.

1. Does a criminal defendant, indicted in a capital case in 1969, who fled the jurisdiction for ten years following the indictment, have a procedural right under the Fourteenth Amendment to the United States Constitution to challenge the composition of the grand jury that returned the indictment, where the Rhode Island Supreme Court held in 1979 that the state grand juries empaneled after January 21, 1975 were unconstitutionally composed, but where the case was still pending trial in 1975?

2. If a defendant has such a right, can that right be waived by prolonged voluntary flight from the jurisdiction prior to arraignment?

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Jurisdiction.

The statute upon which petitioner relies to invoke the jurisdiction of this Court, 28 U.S.C. § 1257(3), does not confer the power of review in this instance. The language of § 1257(3) provides that *final judgments* of the highest court of a state may be reviewed upon a petition for a writ of certiorari. The decision by the Rhode Island Supreme Court in *State* v. *Manocchio*, ____ R.I. ____, 448 A.2d 761 (1982), was interlocutory in nature, and thus outside the scope of the § 1257(3) jurisdictional grant to this Court.

The Rhode Island Supreme Court in *Manocchio* made determinations concerning certified questions of law presented by a justice of the Rhode Island Superior Court. These questions were certified following petitioner's motion to dismiss the indictment brought against him, and prior to a trial on the merits. Upon a negative resolution of the certified questions with respect to the petitioner, the case was remanded by the Rhode Island Supreme Court to the Rhode Island Superior Court for further proceedings consistent with the decision in *Manocchio*. Clearly, these "proceedings" were to encompass not only the denial of the motion to dismiss the indictment, but also the trial of petitioner on the merits.

This Court held in *Joslin Manufacturing Co.* v. *Providence*, 251 U.S. 535 (1919), a civil case, that where the Supreme Court of Rhode Island considered such certified questions and remanded the case to the trial court for further proceedings, the judgment was not final, and the petition for certiorari was dismissed for want of jurisdiction. Further, this Court has often expressed the view that for a judgment to be final, an order to enter a specified judgment or perform a purely ministerial duty on remand must appear from the face of the judgment. *See e.g.*, *Bateman* v. *Arizona*, 429 U.S. 1302 (1976); *Parr* v. *United States*, 351 U.S. 513 (1956); *Berman* v. *United States*, 302 U.S. 211 (1937).

More particularly, in a criminal case, a final judgment is deemed to mean the imposition of sentence. *Bateman* v. *Arizona, supra*, 429 U.S. at 1306. The litigation must be terminated on the merits and the whole matter concluded prior to review, according to *Parr* and *Berman*. As this Court asserted in *United States* v. *MacDonald*, 435 U.S. 850, 853-54 (1978), "The rule of finality has particular force in criminal prosecutions because 'encouragement of delay is fatal to the vindication of the criminal law.'" (Citations omitted.)

The instant case is criminal in nature, and the interlocutory decision appealed from does not contain a collateral or separa-

ble issue of the type which this Court has infrequently reviewed as exceptions to the final judgment requirement. *See Abney* v. *United States*, 431 U.S. 651 (1977) (double jeopardy claim). Where the pre-trial ruling rejecting the double jeopardy claim in *Abney* consisted of a final determination of the rights involved, here, the entitlement of petitioner to indictment by a grand jury representative of a fair cross-section of the community will not be further attenuated by the denial of review until the case has been fully litigated. *See United States* v. *MacDonald, supra*, 435 U.S. at 861. The issue in *Parr* v. *United States*, 351 U.S. 51 (1956), also related to the indictment stage of proceedings; in refusing to find a severable, reviewable issue in the interlocutory appeal, this Court stated that although the petitioner would have to withstand the rigors of trial under the questioned indictment, such was the burden of citizenship, and no review was available.

Therefore, petitioner has improperly invoked the jurisdiction of this Court under 28 U.S.C. § 1257(3), as the decision of the Supreme Court of Rhode Island was interlocutory and the issue non-severable for purposes of review.

Further, petitioner invokes United States Supreme Court Rules 17(1)(b) and (c) in his jurisdictional statement. However, there is no evidence supporting the Rule 17(1)(b) allegation — that the decision of the state court of last resort conflicts with the decision of another state court of last resort or of a federal court of appeals. The petitioner cites no such case in conflict with the decision of the Rhode Island Supreme Court in *Manocchio*.

Constitutional Provisions.

The respondent does not fully agree with the constitutional provisions which petitioner cites in his brief as relating to his case.

The Fifth Amendment right to a grand jury does not apply to state prosecutions. *Peters* v. *Kiff*, 407 U.S. 493 (1972); *Hurtado* v. *California*, 110 U.S. 516 (1884). Therefore, petitioner cannot base any part of his claim on the Fifth Amendment of the United States Constitution.

Statement of the Case.

The respondent substantially agrees with the statement of the case as set forth in the brief of petitioner.

Argument.

I. The Petitioner is Not Entitled to Challenge the Composition of the Grand Jury Which Returned the Indictment Against Him in 1969.

The Rhode Island Supreme Court, in *State* v. *Jenison*, ____ R.I. ____, 405 A.2d 3 (1979), held that the exclusion of the academic community from service on the grand jury was violative of the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution. Subsequently, the question of the retroactivity of *Jenison* was presented to the Rhode Island Supreme Court in *State* v. *O'Coin*, ____ R.I. ____, 417 A.2d 310 (1980). In *O'Coin*, the Rhode Island Supreme Court determined that *Jenison* was to apply to cases in which the grand jury had been impaneled after 1975 and where the conviction had not been finalized prior to 1980. These dates were derived from the decision of this Court in *Taylor* v. *Louisiana*, 419 U.S. 522 (1975), which

expounded the principles concerning a defendant's right to a jury composed of a fair cross-section of the community, and from the date of *O'Coin* itself (1980). The choice of 1975, the date of the *Taylor* decision, was in accordance with the mandate of *Daniel* v. *Louisiana*, 420 U.S. 31 (1975), that retroactive effect of *Taylor* was to apply to juries sworn after 1975 where no new standards of constitutional law above and beyond those enunciated in *Taylor* were evident. *O'Coin* did not produce any such new standards, but was based on the principles of *Taylor*.

The petitioner asserts that *O'Coin* should not apply in his case because retroactivity is not an issue where his conviction is not yet final. However, *O'Coin* was fashioned to address just such a situation, where the jury may have been impaneled prior to 1975, but no conviction was finalized prior to 1980. The Rhode Island Supreme Court framed its two-pronged test in *O'Coin* in the conjunctive, thus making it clear that both criteria were to be met before a *Jenison* challenge would be appropriate.

Although petitioner cites this Court's opinion in *Linkletter* v. *Walker*, 381 U.S. 618 (1975) to buttress his argument that retroactivity principles only apply to final decisions, he removes the language from the historical context in which this Court was considering the retroactivity of decisions. Although it was formerly held that an unconstitutional action was inoperative and that cases arising under such action were nullities, this Court has long since determined that certain decisions promulgated according to principles subsequently overruled may be law for "intermediate transactions". *Linkletter* v. *Walker*, *supra* at 625. The totality of *Linkletter* is directed toward the formulation of criteria for determining the propriety of retrospective application of rulings invalidating prior activities. The major considerations would involve the "prior history of the rule in question, its purpose and effect, and

whether retrospective operation will further or retard its operation". *Id.* at 629. Moreover, in *Stovall* v. *Denno*, 388 U.S. 293 (1967), this Court extended its guidelines for retroactivity to include "the extent to which a condemned practice infects the integrity of the truth-determining process at trial". The three-pronged analysis derived from *Stovall* and set out in *Daniel* v. *Louisiana*, 420 U.S. 31, 32 (1975), combined and amplified the standards for retrospective application of law as "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards", citing *Stovall* v. *Denno*, *supra*. Clearly, this Court has gone far beyond its turn-of-the-century view that cases invalidated by subsequent rulings were null and void. And even though petitioner is willing to agree that most cases finally decided are excluded from retrospective application of subsequent law, the standards referred to above do not readily support the conclusion that pending cases may not also be excluded.

In applying the principles governing retroactivity to petitioner's case, the basis for the Rhode Island Supreme Court's decision in *Jenison* should be examined. In keeping with due process and equal protection principles, the *Jenison* court declared that a grand jury, as well as a petit jury, should be composed of a "fair and impartial" body, because the grand jury "performs the critical function of deciding whether to bring the initial accusation". 405 A.2d at 7. However, once the indictment is returned, the grand jury no longer has any role in insuring the integrity of the fact-finding process, unlike the petit jury. Both *Linkletter* and *Stovall* emphasized the consideration of the infection of the truth determining process by the invalidated practice in evaluating retroactivity. Here, such infection is indeterminate; the grand jury which returned the indictment against petitioner may well have acted fairly, de-

spite its unconstitutional composition. It would seem clear that the "initial accusation" has no effect upon the fairness of the trial itself. The purpose of bolstering the procedural right to a properly constituted grand jury has little to do with the adjudication on the merits. Much like the situation in *Linkletter*, where retrospective application of search-and-seizure law was denied, to allow *Jenison* retroactivity to indictments by grand juries sworn prior to 1975, even where no final convictions exist, would "legitimate" an "extraordinary procedural weapon that has no bearing on guilt [and] would seriously disrupt the administration of justice". *Linkletter* v. *Walker*, 381 U.S. at 637-38.

The particulars of the instant case make the *Linkletter* language especially apropos, where petitioner voluntarily absented himself from Rhode Island for ten years following his indictment. Were respondent compelled to re-indict him at the present time, the charge of conspiracy to murder could no longer be brought against petitioner, in accordance with a three-year statute of limitations. *See* R.I. G.L. 1956 (1981 Reenactment) § 11-1-1 (provision relating to conspiracy charge); R.I. G.L. 1956 (1981 Reenactment) § 12-12-17 (statute of limitations); *State* v. *Patriarca*, 71 R.I. 151, 43 A.2d 54 (1945) (any charge not specifically exempted by statute of limitations is included). Thus, by merely fleeing the state, and later returning to challenge the composition of the grand jury indicting him, a defendant indicted prior to 1975 could effectuate the running of statutes of limitation in his favor. This result hardly seems in keeping with the effective administration of justice, the third prong of the test for the propriety of retrospectivity. Certainly, the values embodied in the right to a properly constituted grand jury are not "measurably served", *DeStefano* v. *Woods*, 392 U.S. 631 (1968), by the retroactive application of *Jenison* to indictments returned prior to the 1975 date of the *Taylor* decision.

In sum, it is apparent that the standards for applying retroactivity in this case beyond those articulated in *O'Coin* have not been met.

II. The Rhode Island Supreme Court did Not Err in Refusing to Determine Whether or Not Petitioner Waived his Right to Challenge the Composition of the Grand Jury.

The Rhode Island Supreme Court did not rule on the second of the questions certified to it by the Rhode Island Superior Court relating to petitioner's waiver of right to challenge the grand jury composition due to his voluntary absence of ten years. The decision in *Manocchio* was determined by the resolution of the first certified question involving the issue of the retroactivity of *Jenison*, and so the Rhode Island Supreme Court properly declined to address the waiver question.

However, assuming that petitioner did have the right to challenge his 1969 indictment, it is arguable that he waived the right through his prolonged voluntary absence subsequent to his indictment. Despite the fact that R.I. Super.R.Crim. P. 12(b)(3) allows the challenge to the constitution of the grand jury within a specified time after the plea is entered, the extended period between indictment and arraignment which is attributable to a defendant may seriously impede the effective administration of justice by causing loss of the right to reindict, as is here the case on the conspiracy charge, and contribute to the unavailability of witnesses. *See Commonwealth* v. *Millhouse*, 255 Pa. Super. 206, 386 A.2d 581 (1978).

In *Michel* v. *Louisiana*, 350 U.S. 91 (1955), which petitioner cites in support of his contention that his flight did not result in waiver, this Court stated: "[D]ue regard for the fair as well as effective administration of criminal justice gives the State a legitimate interest in requiring reasonable attacks on its inquis-

itorial process . . .." *Id.* at 98. *Michel* also points to the specific problems to which a defendant's flight and subsequent challenge to grand jury composition give rise, and which call for the "prompt determination of . . . preliminary matters": "[A] long delay in . . . determination . . . makes it extremely difficult in this class of case for the State to overcome the prima facie claim which may be established by a defendant. Material witnesses and grand jurors may die or leave the jurisdiction, and memories . . . may lose their sharpness." *Id.* at 98 n.5.

Although petitioner may have technically complied with the time requirements for his challenge to the grand jury composition, clearly, such delay between indictment and challenge was never envisioned by the framers of the statutory provision. This is particularly so where the delay was fully attributable to petitioner.

Therefore, it is respondent's position that the Rhode Island Supreme Court did not err in failing to address the waiver question, and that petitioner is in error in concluding that he could not be deemed to have waived his right to challenge the composition of the grand jury which indicted him.

Conclusion.

Therefore, since petitioner has presented inadequate jurisdictional grounds, and is not entitled to challenge the composition of the grand jury which returned the indictment against him either on the basis of lack of retroactivity of *State* v. *Jenison*, ____ R.I. ____, 405 A.2d 3 (1979), or waiver of right to challenge, respondent respectfully urges this Court to deny the petition for writ of certiorari.

Respectfully submitted,

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